



August 30, 2013

Brenden McFarland  
Washington State Department of Ecology  
C/O Fran Sant  
PO Box 47703  
Olympia, Washington 98504-7703

RE: 2013 SEPA Rulemaking – DOE Draft Status report July 19, 2013

Dear Mr. McFarland:

On behalf of Puget Sound Energy ("PSE") we appreciate the opportunity to comment on the July 19, 2013 Draft Status Report.

In 2012 the legislature directed the Washington State Department of Ecology ("Ecology") to update the State Environmental Policy Act ("SEPA") rules in order to streamline regulatory processes and to achieve program efficiencies. The legislature recognized that SEPA's rule-based categorical exemptions had not been updated for many years. The 2012 legislation also included specific direction to Ecology to review and update categorical exemptions in light of more recent land use and environmental protection laws.

We urge Ecology to take action that will streamline SEPA, especially where SEPA overlaps with other laws that adequately protect and preserve our environment. Below are PSE's comments related to specific proposals and considerations presented by Ecology in the Draft Status Report.

- **Air and water discharge permits exception**

**Topic:** Non-exemption when there are licenses governing emissions to the air or discharges to water.

**Rule section:** 197-11-800 (1) and (2)

**Comment:** These activities are exempt because they are small in scale and not because of the nature of the permits that may or may not be required. If an air or water permit is required for a proposal that otherwise qualifies as "minor new construction" the permit will address the impact of this development on air or water. The proposal should not lose its exempt status because these permits are required.

**Recommendation:** Air and water permits will address the air and water consequences of any "minor new construction." Both qualifications to the exemption (the air and water permit "non-exemptions") should be eliminated.

- **Modify fill and excavations project type**

**Topic:** Modify fill and excavation exemption to clarify applicability.

**Rule section:** 800 (1) Minor New Construction

**Comment:** As the Draft Status Report notes, embedding this exemption within the minor new construction exemption is confusing. Clearing and grading associated with exempt minor new construction (or any other exempt project) is exempt regardless of quantity of fill or excavation. The 1,000 cu yard threshold for clearing, grading, excavation and fill activities should be codified as a stand-alone exemption and it should apply to all agencies.

**Recommendation:** PSE supports Option 2 as described in the Draft Status Report. We recommend that Ecology move this exemption to 800 (2) and apply the 1000 cu yards threshold for all agencies.

- **Lands covered by water**

**Topic:** Lands covered by water – clarifications regarding applicability and/or eliminating or reducing non-exemptions.

**Rule section:** 800 (1), (2), (3), (6), and (23)

**Comment:** When first conceived, presumably the purpose of the "lands covered by water" non-exemption was to ensure that potential impacts to aquatic resources associated with exempt actions received adequate environmental review. SEPA was first enacted in 1971. Over the ensuing forty plus years many state laws (most notably, the Shoreline Management Act, Critical Areas regulation under the Growth Management Act, and the requirements of Chapter 77.55 RCW pertaining to Hydraulic Project Approvals) and federal laws have been enacted or interpreted to comprehensively regulate and protect these resources. The language "lands covered by water" and the corresponding "non-exemption" dates back to the SEPA "Red Book" (WAC 197-10) promulgated in 1975. This language was carried forward in 1984 (WAC 197-11) and exists today as the current rule. The regulatory landscape has changed significantly and SEPA is no longer the primary tool available to regulators to protect these resources

We encourage Ecology to reconsider the need for a broadly-stated "lands covered by water" non-exemption limiting the applicability of WAC 197-11-800(1),(2),(3),(6), and (23). Permits necessary to construct facilities in critical areas or in shoreline areas adequately address impacts to any "lands covered by water." Exempt actions are not otherwise of a kind or character that require environmental review. These actions should not lose their exempt status under circumstances where impacts to "lands covered by water" have been addressed through the permitting process.

Another approach to addressing this issue is to limit the applicability of these categorical exemptions to activities that do not require any in-water work. For example, the exemption established by WAC 197-11-800 (23)(c) applies to:

"All electric facilities, lines, equipment or appurtenances, not including substations, with an associated voltage of 55,000 volts or less; the overbuilding of existing distribution lines (55,000 volts or less) with transmission lines (up to and including 115,000 volts); within existing rights of way or developed utility corridors, all electric facilities, lines, equipment or appurtenances, not including substations, with an associated voltage of



115,000 volts or less; and the undergrounding of all electric facilities, lines, equipment or appurtenances."

It is difficult to construct any linear infrastructure project in western Washington without encountering "lands covered by water." Frequently, these areas can be spanned or existing infrastructure and facilities can be used to avoid any in-water work or disruption of aquatic resources. Yet, as applied by most lead agencies, if any part of the project is on "lands covered by water"--even where there is no in-water work or physical disruption of aquatic resources--the exemption is lost for the entire project. As noted above, these activities occur in shoreline or critical areas where ample measures are otherwise in place to protect these resources. At a minimum the "lands covered by water" non-exemption should be limited to exempt activities that require in-water work resulting in the physical disruption of aquatic resources.

**Recommendation:** PSE recommends that the "lands covered by water" non-exemption applicable to WAC 800 (1)(2)(3) (6), and (23) be eliminated. Other regulatory requirements specific to aquatic resource adequately preserve and protect these resources and exempt actions are not otherwise of a kind or character that require environmental review. Alternatively, PSE recommends that the rule be changed to limit the non-exemption to activities that require in-water work resulting in the physical disruption of aquatic resources.

- **Updating minor new construction language**

**Topic:** Modify Other Minor New Construction

**Rule section:** 800(2)(c) Other Minor New Construction

**Comment:** Ecology notes that City of Seattle has proposed adding the words "for the purpose of road and street improvements" as a further qualification to the words "installation of catch basins and culverts" currently provided by WAC 197-11-800(2)(c). This exemption is embedded in a long laundry list of specific activities that can be difficult to interpret. PSE is concerned that the proposed change could be interpreted to unduly limit this exemption. Utility rights-of-way do not function as "road or streets" but are very similar types of development. Utility rights of way periodically require the "installation of catch basins and culverts" which for all practical purposes is no different than the installation of a catch basin or culverts as a road improvement. If the purpose of the rule change is, as stated on Ecology's website, to "achieve program efficiencies," then adding distinctions like the City of Seattle is suggesting is contrary to this goal. Rather, we suggest that Ecology take a broader look at WAC 197-11-800(2)(c) and consider changes that clarify the applicability of these exemptions to road, street, utility and other rights of way that are developed and maintained for public purposes.

**Recommendation:** PSE does not support a change to the rules that would limit the culvert exemption to road and street improvements. Rather, PSE recommends that Ecology take a broader look at WAC 197-11-800(2)(c) and consider changes that clarify the applicability of these exemptions to road, street, utility and other rights of way that are developed and maintained for public purposes.

- **Exemption for demolition of buildings**

**Topic:** Exemption for demolition of buildings

**Rule Section:** 197-11-800(2)(f)

**Comment:** According to the Draft Status Report, Ecology is considering adding the words "eligible for listing" and to broaden the scope of the non-exemption applicable to this categorical exemption. Currently, the non-exemption is limited to structures or facilities *listed* in the national or state register. The proposed change will further limit and reduce the circumstances to which the current threshold for exemption applies. This change would not be consistent with the Legislature's directive to update, but *not decrease*, existing thresholds for categorical exemptions.

In addition to being at odds with the legislative intent the proposed change is not good policy. "Eligibility" for listing is determined by application of subjective criteria. There are both procedural safeguards and regulatory certainty afforded by an actual listing, as distinct from a determination of "eligibility." Interjecting a subjective element to this exemption may lead to disputes and inconsistent results that vary among jurisdictions. There is adequate protection afforded by the limited scope of the exemption as it is currently drafted (i.e., it only applies to demolition of structure the construction of which would be exempt as "minor new construction"). For these reasons, PSE does not believe that the proposed change is either necessary or advisable.

**Recommendation:** PSE supports Option 3 and does not believe that an amendment to this provision is required.

- **Repair, remodeling and maintenance activities**

**Clarify in-water maintenance work, dredging, bulkheads**

**Topic:** Clarify and expand exemptions for in-water maintenance

**Rule section:** 197-11-800(3)

**Comment:** PSE agrees that this exemption should be expanded and clarified and supports Option 1 as presented in the Draft Status Report. If this change is made, however, it should also apply to WAC 197-11-800(3)(c). PSE also supports Option 2 as an alternative, but prefers Option 1. PSE does not support Option 4, as we believe that this is a matter better left to lead agencies for interpretation.

**Recommendation:** PSE supports Option 1 and proposes consistent and conforming edits to WAC 197-11-800(3)(c), as follows:

(c) Replacement of utility cables that must be buried under the surface of the bedlands, *if such replacement requires the dredging and removal of more than 50 cubic yards of non-toxic sediment.*

Were Option 2 to be adopted, we propose as a corresponding change to WAC 197-11-800(3)(c):

c) Replacement of utility cables that must be buried under the surface of the bedlands, *if such replacement requires the dredging and removal of more than 20 cubic yards of non-toxic sediment.*



- **Clarification and addition – not including in-water work**

**Topic:** Clarify and expand maintenance exemptions –not including in-water work

**Rule section:** 197-11-800 (3)

**Comment:** WSDOT and Seattle suggest edits to 197-11-800(3) to "clarify" that the exemption applies to transportation facilities. By its express terms, the exemption also applies to utilities and PSE is concerned with the placement of the language recommended by WSDOT so as not to inadvertently limit the scope of this exemption.

**Recommendation:** PSE supports retaining the current language as it exists. To address WSDOT's concern, we suggest the following edits to the existing rule:

The repair, remodeling, maintenance, or minor alteration of existing private or public structures, facilities or equipment, including utilities and transportation facilities, involving no material expansions or changes in use beyond that previously existing; ...

- **Local improvement Districts, Consider expanding to all special purpose districts**

**Topic:** Update and expand exemption for establishing special districts

**Rule section:** 800 (16)

**Comment:** The Draft Status Report states that Ecology plans to add language to exempt formation of all special districts or special purpose districts from SEPA. PSE strongly objects to this change. Ecology's proposal would have the unintended consequence of introducing a competitive bias in a law that is supposed to look objectively at the environmental consequences of actions taken by public agencies.

PSE has been serving customers in the State of Washington for over 100 years. During this time PSE has responded to many attempted acquisitions initiated by formation of Public Utility Districts (PUDs) pursuant to Title 54 RCW. The decision to form a PUD and to go into the electric utility business is an action that is the first step towards the acquisition, construction, maintenance and operation of electric generation, transmission and distribution facilities. Breaking apart an existing system from a new system can also drive significant construction and development activities that affect virtually every element of the environment listed in WAC 197-11-444. Moreover, SEPA explicitly states at WAC 197-11-055:

The SEPA process shall be integrated with agency activities at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to seek to resolve potential problems.

If the county legislative authority resolves to create a PUD pursuant to RCW 54.08.010 this is clearly an "action" for purposes of SEPA. There is no reason to exempt this action from SEPA. There are significant environmental issues that SEPA requires a county legislative authority to address, under the rules as they exist today, before such an action is taken. There is no other regulatory requirement that assures that these issues are otherwise considered and addressed before action is taken.

**Recommendation:** PSE strongly objects to this proposed edit and recommends that Ecology make no change to 197-11-800(16).

- **Utilities, Increase pipe size**

**Topic:** Increase and modify water utility exemption

**Rule section:** 197-11-800(23) Utilities

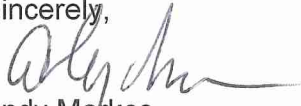
**Comment:** In response to a comment from the City of Seattle Ecology is considering a change that would allow an expansion of the threshold established by WAC 197-11-800(23) for water pipes. However, in addressing this issue, the City of Seattle has suggested changes to a portion of the exemption that also applies to natural gas and electric facilities. The language proposed is somewhat confusing and perhaps a better place to address the City's concern is in subsection WAC 197-11-800(23)(b), not in the more general language of the exemption, as proposed.

**Recommendation:** PSE recommends that Ecology not make the proposed change to 197-11-800 (23). However, PSE would support a change to subsection WAC 197-11-800(23)(b) that addressed the issue raised by the City of Seattle, as follows:

(c) All storm water, water and sewer facilities, lines, equipment, hookups or appurtenances including, utilizing or related to lines twelve inches or less in diameter.

PSE appreciates the staff time and public input that has been part of the considerations that led to the suggested changes proposed to SEPA categorical exemptions. If you have questions related to any of the recommendations or comments provided above please do not hesitate to contact me at [andy.markos@pse.com](mailto:andy.markos@pse.com) or (253) 476-6295.

Sincerely,



Andy Markos  
Puget Sound Energy